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In the

Supreme Court of the United States

October Term, 1995

JAY PRINTZ, Sheriff/Coroner
Ravalli County, Montana,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

* SHARON L. BROWNE
ANNE M. HAWKINS
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Amicus Curiae

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QUESTIONS PRESENTED FOR REVIEW

Whether Congress has power under Article I, Section 8, of the United States Constitution, consistent with the Tenth Amendment as interpreted in *New York v. United States*, 505 U.S. 144 (1992), to command state-created chief law enforcement officers: to search records and to ascertain whether persons may lawfully purchase handguns; to destroy records concerning handgun purchasers; and to provide the reasons for adverse determinations, as mandated by the Brady Act, 18 U.S.C. § 922(s)(2), (6)(B), and (C).

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has nearly 25,000 supporters nationwide. Policy for PLF is set by a Board of Trustees composed of concerned citizens, many of whom are lawyers. PLF's Board of

Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

PLF has participated in numerous cases concerning the Tenth Amendment and limitations upon Congress' Article I powers. For example, PLF participated as amicus curiae before this Court in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981), and *United States v. Lopez*, 514 U.S. ____, 115 S. Ct. 1624 (1995).

Amicus seeks to augment the argument in the petition for writ of certiorari. PLF believes that its public policy perspective and litigation experience dealing with state sovereignty issues will provide an additional viewpoint with respect to the constitutional and legal issues presented. Pursuant to Rule 37.2, written permission from all parties for PLF to file this brief has been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

In 1993, the United States government enacted the Brady Act (18 U.S.C. § 922(s)) as an amendment to the Gun Control Act of 1968, 18 U.S.C. § 922. The Brady Act is a comprehensive piece of legislation. At its heart is the requirement that licensed gun retailers, or "transferors," obtain a statement from prospective transferees regarding their background. The transferor must then notify the chief law enforcement officer (CLEO) of the locality about the prospective transfer and wait five days before the transfer may be effected. CLEOs are not federal employees but, instead, are state and local officials. The Brady Act simply refers to CLEOs by the designation "chief law enforcement

officer of the place of residence of the transferee." 18 U.S.C. § 922(s)(1)(A)(i)(III). The Brady Act requires CLEOs to undertake affirmative duties in order to comply with Congress' mandates under that law. 18 U.S.C. § 922(s)(2) requires:

> A [CLEO] to whom a transferor has provided notice pursuant to paragraph (1)(A)(i)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local record-keeping systems are available and in a national system designated by the Attorney General.

In addition, the Brady Act requires that, should the CLEO identify no basis for finding the transfer unlawful, the CLEO

> shall, within 20 business days after the date the transferee made the statement on the basis of which the notice was provided, destroy the statement, any record containing information derived from the statement, and any record created as a result of the notice required by paragraph (1)(A)(i)(III).

18 U.S.C. § 922(s)(6)(B)(i). The CLEO must also insure that the information contained in the transferee's statement "not be conveyed to any person except a person who has a need to know in order to carry out this subsection." 18 U.S.C. § 922(s)(6)(B)(ii). Further, should the CLEO determine that it would be unlawful for the transferee to obtain the handgun, the denied transferee may request an explanation for the denial and the CLEO "shall provide such reasons to the individual in writing within 20 business days after receipt of the request." 18 U.S.C. § 922(s)(6)(C).

Sheriff Jay Printz is the sheriff of Ravalli County, Montana, and, as such, is the chief law enforcement officer, or CLEO, of the county. He is thereby subject to the mandates of these provisions in the Brady Act. *Mack v. United States*, 66 F.3d 1025, 1028 (9th Cir. 1995).[1]

SUMMARY OF ARGUMENT

On September 8, 1995, the United States Court of Appeals for the Ninth Circuit, in a 2-1 decision, reversed the decisions of two United States District Courts, *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994), and *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994), and upheld the constitutional validity of certain portions of the Brady Act against a challenge brought by two county sheriffs based on the Tenth Amendment to the United States Constitution. *Mack v. United States*, 66 F.3d at 1034. The challenged provisions, Section 922(s)2, (6)(B), and (C),

[1] Sheriff Richard Mack is a sheriff in Graham County, Arizona. He brought an action in federal District Court successfully challenging the constitutionality of the Brady Act. *Mack v. United States*, 856 F. Supp. 1372. On appeal, the Ninth Circuit consolidated that action with Sheriff Printz' action, and reversed the judgments of the District Courts. *Mack v. United States*, 66 F.3d 1025. Sheriff Mack has also filed a Petition for a Writ of Certiorari to this Court, *Mack v. United States*, United States Supreme Court No. 95-1503, seeking review of the Ninth Circuit decision. Because the petitions for Writ of Certiorari filed by Sheriffs Mack and Printz arise out of the same Ninth Circuit decision, Pacific Legal Foundation has elected to file a single brief amicus curiae in support of petitioner Printz.

impose certain duties upon these sheriffs, who are the CLEO's of their respective counties.

On March 14, 1996, the United States Court of Appeals for the Second Circuit held, consistent with the Ninth Circuit's opinion, that the Brady Act did not violate the Tenth Amendment to the United States Constitution. *Frank v. United States*, ____ F.3d ____, 1996 WL 116182 (1996). On March 21, 1996, after petitioner herein filed his Petition for Writ of Certiorari to this Court, the United States Court of Appeals for the Fifth Circuit, in *Koog v. United States*, ____ F.3d ____, 1996 WL 131950 (1996), issued an opinion which directly conflicts with the opinions of the Ninth and Second Circuits. *Koog* holds that all three of the Brady Act provisions challenged here by petitioner are unconstitutional as a violation of the Tenth Amendment to the United States Constitution. This Court should grant Petitioner's Petition for Writ of Certiorari to resolve the present direct conflict between the Fifth and the Second and Ninth Circuits.

The decisions of the Ninth and the Second Circuits upholding the duties imposed by the Brady Act upon the CLEOs fly in the face of this Court's prior pronouncements about the limits of federal power to intrude upon state sovereignty. This Court held, in *New York v. United States*, 505 U.S. 144 (1992), that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." *New York*, 505 U.S. at 188. The Brady Act is in substance a federal regulatory program instituting special procedures for carrying out the legal transfer of handguns. The obligation for carrying out these procedures is imposed directly upon cities and counties, instead of on the states. However, the prohibition against compelling states to administer a federal regulatory program as proclaimed in *New York* must likewise extend to cities and

counties, which are merely political subdivisions of the states. This Court should grant the Petitioner's Writ of Certiorari to resolve conclusively whether the federal government may, consistent with federalism, impose affirmative duties upon local government officials to administer a federal regulatory program.

ARGUMENT

I

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO RESOLVE A DIRECT CONFLICT BETWEEN THE CIRCUITS

To date, six federal District Courts have had occasion to consider the three challenged provisions of the Brady Act--the background check requirement, the record destruction requirement and the written explanation requirement--in the face of similar challenges from other law enforcement officials.[2] The conflict that currently exists between the

[2] *Printz v. United States*, 854 F. Supp. 1503 (holding background check provision of Brady Act unconstitutional), *rev'd, Mack v. United States*, 66 F.3d 1025; *Mack v. United States*, 856 F. Supp. 1372 (holding background check provision of Brady Act unconstitutional), *rev'd, Mack*; *Koog v. United States*, 852 F. Supp. 1376 (W.D. Tex. 1994) (holding Brady Act constitutional), *rev'd, Koog v. United States*, 1996 WL 131950; *McGee v. United States*, 863 F. Supp. 321 (S.D. Miss. 1994) (holding background check provision of Brady Act unconstitutional), *aff'd* as to background check, *rev'd* as to record destruction and written (continued...)

Fifth Circuit on the one hand and the Second and Ninth Circuits on the other is palpable and unambiguous. In upholding the challenged provisions of the Brady Act, the Ninth Circuit flatly "reject[ed] ... Printz' Tenth Amendment challenge to the Brady Act" in finding all three provisions constitutional. *Mack v. United States*, 66 F.3d at 1033. In contrast, the Fifth Circuit concluded:

> [W]e hold that the background checks, record destruction and written explanations of denials imposed on the CLEOs by the Brady Act are unconstitutional in violation of the Tenth Amendment.

Koog, 1996 WL 131950 at 10. In reaching this conclusion, the Fifth Circuit considered and rejected the reasoning of the Ninth Circuit's holding in *Mack*. It specifically rejected the Ninth Circuit's characterization of the Brady Act's imposition on the CLEOs as "minimal," *Koog*, 1996 WL 131950 at 9, and further that the degree of intrusion rather than the manner of its exercise was the relevant question for purposes of a Tenth Amendment inquiry. *Id.*

[2] (...continued)
explanation requirement, *Koog*; *Romero v. United States*, 883 F. Supp. 1076 (W.D. La. 1994) (holding background check, record destruction, and written explanation requirement provisions of Brady Act unconstitutional), bound by Fifth Circuit opinion in *Koog*; *Frank v. United States*, 860 F. Supp. 1030 (D. Ver. 1994) (holding background check provision of Brady Act unconstitutional), *rev'd*, *Frank v. United States*, 1996 WL 116182.

The problems created by this conflict are critical with far-reaching consequences. As matters stand, CLEOs within the Fifth Circuit are under no legal duty to comply with the dictates of the Brady Act, while CLEOs within the Second and Ninth Circuits are bound by the mandates of those courts. The disparity created by this situation has a substantial effect not only upon CLEOs within the different states, but upon state and local governments and upon the citizens of the states within those Circuits. The duties imposed upon the CLEOs involve the expenditure of limited public funds, and the time commitments involved in carrying out those duties necessarily impact the ability of those CLEOs to carry out their state-mandated obligations--obligations which directly affect the safety and security of millions of individuals.

Because of the tremendous impact that the conflict in the federal Circuits has created, this Court should grant Sheriff Printz' Petition for Writ of Certiorari to eliminate the existing conflict. This Court should resolve conclusively and expeditiously whether the duties imposed by Congress upon local law enforcement officials under the Brady Act were enacted in contravention of the federalism principles embodied in the Tenth Amendment to the United States Constitution.

II

THIS COURT SHOULD RESOLVE WHETHER CONGRESS CAN IMPOSE MANDATORY DUTIES UPON LOCAL GOVERNMENT OFFICIALS CONSISTENT WITH THE FEDERALISM PRINCIPLES ENUNCIATED IN NEW YORK V. UNITED STATES

A. New York v. United States Defines the Standard Against Which the Brady Act Must Be Measured

As recognized by the Fifth Circuit in its *Koog* decision, "*New York* is central to the question before us." *Koog*, 1996 WL 131950 at 3. In *New York v. United States*, this Court held that the "take title" provisions to the Low-Level Radioactive Waste Amendments of 1985, which forced state governments to either take title to radioactive waste or regulate the waste according to federal mandates, violated the Tenth Amendment. *New York v. United States*, 505 U.S. at 177. This Court held that under the federal structure created by the Constitution, "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." *New York*, 505 U.S. at 188.

The Tenth Amendment to the United States Constitution states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

It has been described as iterating "a truism that all is retained which has not been surrendered." *United States v. Darby*, 312 U.S. 100, 124 (1941). However, this Court recognized that while the text of the Tenth Amendment, by itself, may appear a tautology, "the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York*, 505 U.S. at 156-57. In other words, the Tenth Amendment demonstrates that the Framers contemplated a federal structure of separate and independent sovereigns. In the absence of that understanding, the Tenth Amendment would lack significance.

Sheriff Printz challenge rests upon the contention that the Brady Act's dictates are in direct contravention of this federal structure. Printz, a local sheriff who was hired and is obligated to carry out state and locally mandated law enforcement duties, has had additional duties thrust upon him by federal legislation. Unlike many of the cases that have come before this Court addressing the Tenth Amendment, this case does not concern the authority of Congress to subject state or local governments to generally applicable laws. *See, e.g., National League of Cities v. Usery*, 426 U.S. 833 (1976) (application of Fair Labor Standards Act to employees of the states and their political subdivisions); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (application of Fair Labor Standards Act to municipal employees); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (application of Age Discrimination in Employment Act to state judges). Rather, under the Brady Act, CLEOs such as Sheriff Printz are singled out from among all other individuals and officeholders to carry out affirmative job duties in order to comply with the Act. As in *New York*, where Congress placed specific burdens upon state legislatures and the state itself, "[t]his case instead concerns the circumstances under which Congress may use

the States as implements of [federal] regulation." *New York*, 505 U.S. at 161.

B. With the Brady Act, Congress Has Not Chosen a Permissible Means by Which to Regulate

> While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.

New York, 505 U.S. at 152. This Court has made it clear that the Constitution's framework empowers the federal government to act upon individuals rather than upon the states as states. *See generally, New York*, 505 U.S. at 162-66. Petitioner Printz, like the petitioners in *New York*, is specifically contending that "the Tenth Amendment limits the power of Congress to regulate in the way it has chosen." *New York*, 505 U.S. at 160. This Court has identified two permissible means by which the federal government may urge states to carry out federally mandated policies: First, "Congress may attach conditions on the receipt of federal funds," *South Dakota v. Dole*, 483 U.S. 203, 206 (1987); and second, Congress has the power to offer states the option of regulating its own commerce-related activity according to federal standards or have state regulations preempted by federal regulation funded by the federal government. *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. at 288. In the present case, Congress has chosen neither permissible means. The Brady Act does not provide for an expenditure of federal funds which would enable the states to accept or reject the federal mandate conditioned upon the receipt of those funds. Neither has Congress given states the option

of self-regulation versus federal preemption. On the contrary, the Brady Act usurps state resources and compels local law enforcement agencies to become agents of a federal regulatory regime.

This Court has been sensitive to the dangers to our federal structure should Congress adopt a scheme which deviates from these permissible methods:

> If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated program, and they may continue to supplement that program to the extent state law is not preempted. Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.
>
> ....
>
> But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.

New York, 505 U.S. at 168. These perceived dangers are apparent in the present case. Sheriff Printz has limited

resources in funds and manpower by which to carry out not only his state-mandated duties but the new federally imposed duties under the Brady Act.

C. The Duties Imposed upon the CLEOs by Congress Under the Brady Act Are Incompatible with the Principles Federalism Was Designed to Protect

In the face of Sheriff Printz' contentions that Congress' Brady Act mandates suffer from the very infirmities this Court found unconstitutional in the "take title" provisions in *New York*, the Ninth Circuit instead found that "[t]he Brady Act is not the kind of federal mandate condemned by *New York*, nor does it present the concerns" enunciated in that case. *Mack*, 66 F.3d at 1031. Specifically, it found that "[w]hen the federal government itself imposes a requirement on a state official, the requirement is more clearly an act of the federal government and thus does not, to the same extent, undermine political accountability." *Id.* The Ninth Circuit found significant the fact that, here, unlike in *New York*, Congress was not forcing states to enact legislation or create its own regulations, "activities [which] are inherently central acts of a sovereign." *Id.* Rather than finding this salutary, in his *Mack* dissent, Justice Fernandez decried:

> Now Congress has avoided those issues, but it has done so by eliminating the niceties of the federal-state relationship entirely. Rather than ordering state legislatures or agencies to adopt a scheme for vetting requests for gun transfers, Congress has avoided that hindrance and dragooned the state officials directly.
>
> ....
>
> This legislation is a step toward concentrating power in the hands of the federal government, for it treats state officials and workers as if they were

> mere federal employees. It makes every CLEO's office an office of the federal bureaucracy, funded by the states, but directed from Washington.

Mack, 66 F.3d at 1035 (Fernandez, J., dissenting). The Fifth Circuit opinion mirrored Justice Fernandez' sentiments in holding that "one might argue that Congress engaged in a certain legislative legerdemain in an attempt to fashion its will to meet constitutional muster." *Koog*, 1996 WL 131950 at 5.

Further, in an analysis diametrically opposed to the Ninth Circuit's reasoning, the Fifth Circuit described precisely the problem of political unaccountability created by the mandates in the Brady Act:

> For citizens that encounter the palpable consequences of the law, Congress is nowhere to be found. Congress does not employ the CLEO, supervise his work or pay his salary; the nameplate of no federal office is on the door. But the diffusion of accountability does not end at this point. Even if the affected citizen is aware that the legislation mandating background checks springs from the national government, and then turns to the Brady Act to determine political accountability, he will find that the CLEO himself is responsible for deciding what is a "reasonable" search. Laying this responsibility at the CLEO's political doorstep permits Congress effectively to shift "the political liability for subsidiary decisions from federal to state officials."

Koog, 1996 WL 131950 at 8 (citation omitted). In an area so politically charged as gun control, it is essential that the individuals who must live subject to the laws know clearly who may be held accountable for the consequences of the legislation at issue.

The Fifth Circuit's analysis of the danger to federalism principles is further bolstered by the nature of the exercise of Congress' power in this instance. Public safety functions are especially susceptible not only to the accountability problems cited by the Fifth Circuit, but also to sovereignty questions in general, by virtue of the fact that law enforcement is one of core functions of state and local governments. In holding a criminal statute beyond Congress' Commerce Clause powers, this Court recently observed

> "States possess primary authority for defining and enforcing the criminal law." ... "Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the states except as Congress, acting within the scope of those delegated powers, has created offenses against the United States."

United States v. Lopez, 115 S. Ct. at 1671 n.3 (citations omitted). While this Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. at 531, rejected the "traditional governmental function" test formulated in

National League of Cities v. Usery, 426 U.S. 833, the principle behind the distinction remains viable. Certain government functions are so inherently local in nature that federal interference with those functions, if not per se violative of the Tenth Amendment, require that Congress refrain from exercising powers in a way that will "federalize" state officials. In spite of this, the Ninth Circuit found no constitutional problem in its conclusion that CLEOs were being "directed to serve for a temporary period as law enforcement functionaries in carrying out a federal program." *Mack*, 66 F.3d at 1031.

As this Court has pointed out, the Tenth Amendment question revolves not around whether Congress has chosen a permissible end, but whether Congress has chosen a permissible means to exercise a legitimate government power:

> No matter how powerful the federal interest involved the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to preempt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

New York, 505 U.S. at 178. While the question may appear "formalistic," *New York*, 505 U.S. at 187, the purpose of the question goes to the heart of the form of government created by the Constitution:

> Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive

> power in any one branch, a healthy balance of power between the State and the Federal Government will reduce the risk of tyranny and abuse from either front.

Gregory v. Ashcroft, 501 U.S. at 458. "In the tension between federal and state power lies the promise of liberty." *Gregory v. Ashcroft*, 501 U.S. at 459.

This Court should grant Petitioner's Petition for Writ of Certiorari to determine whether the imposition of federally mandated affirmative duties upon local law enforcement officials violates the Tenth Amendment by encroaching impermissibly upon the sovereignty of the states.

CONCLUSION

Under the Brady Act, local law enforcement officials are required to carry out federal duties in addition to the duties presently existing under their own state and local laws without additional funding or assistance from the federal government. While Congress may have rationally concluded that implementing its federal firearm regulations through local law enforcement is the most efficacious, this Court has stated clearly that, consistent with the Tenth Amendment, Congress "may not compel the states to ... administer a federal regulatory program," *New York v. United States*, 505 U.S. at 188.

Amicus respectfully urges this Court to adjudicate conclusively the right of local law enforcement officials to be free from carrying out federally mandated duties, and to thereby resolve an existing conflict between the Fifth and the Second and Ninth Circuits. Amicus requests that this Court

grant Petitioner's Petition for Writ of Certiorari to determine whether the Brady Act represents an impermissible intrusion into the sovereignty of the states in violation of the Tenth Amendment to the Constitution of the United States.

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Respectfully submitted,

* SHARON L. BROWNE
ANNE M. HAWKINS
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae